JUN 19 1947
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1946
No. 1469

FRANK W. FORD, as Trustee in bankruptcy of Harlem Garment Center, Inc., bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

I. JONAS SPEGINER,
Attorney for Petitioner,
11 West 42nd Street,
New York (18) N. Y.

JULIUS M. ARNSTEIN,
11 West 42nd Street,
New York (18) N. Y.,
of Counsel.

June 2nd, 1947.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	4
Statement	5
Specification of Errors to be Urged	16
Reasons for Granting the Writ	20
Conclusion	22

CITATIONS

Cases:

Dayton Hotel Co., Re (C. C. A. 7th) 110 Fed. (2) 459; cert. den. 310 U. S. 641 ..... 4, 12, 14, 19, 21

Gallis, Re (C. C. A. 7th) 115 Fed. (2) 626; cert. den. 312 U. S. 704 ..... 4, 12, 15, 19, 21

Harrison v. Chamberlin, 271 U. S. 191 ..3, 12, 16, 17, 19, 20

Kansas City Journal-Post Co., Re (C. C. A. 8th) 144 Fed. (2) 819; cert. dis. 323 U. S. 807 ....4, 12, 13, 19, 21

May v. Henderson, 268 U. S. 111 .....12, 16, 19, 20

Rabinovitz v. Oughton (C. C. A. 3rd) 92 Fed. (2d) 297; cert. den. 303 U. S. 649 .....4, 12, 19, 20, 22

PAGE

STATUTES AND RULES:

Bankruptcy Act.

Tit. 11, Sec. 11a (7) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 842 (Sec. 2a (7) of the Bankruptcy Act) 4

Tit. 11, Sec. 11a (15) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 842 (Sec. 2a (15) of the Bankruptcy Act) 4

Tit. 11, Sec. 66 (6) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 857 (Sec. 38 (6) of the Bankruptcy Act) 4

Tit. 11, Sec. 75 (a) (1) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 860 (Sec. 47a (1) of the Bankruptcy Act) 4

Rule 52 (a) of the Fed. Rules of Civil Procedure ..3, 5, 17, 19, 21

Supreme Court of the United States

October Term, 1946

No.

FRANK W. FORD, as Trustee in bankruptcy of Harlem Garment Center, Inc., bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your petitioner, Frank W. Ford, as Trustee in bankruptcy of Harlem Garment Center, Inc., bankrupt, respectfully applies for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered February 28, 1947 (R. 218), reversing an order of the United States District Court for the Southern District of New York (R. 203), which had affirmed an order of the Referee in bankruptcy granting a turnover motion against an officer of the bank-

rupt (R. 190-193). Petition for rehearing was denied on March 13, 1947 (R. 224-225). A certified copy of the record, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, paragraph 1, of the Rules of this Court.

Opinions Below

The opinion of the Referee is at R. 180-189. The opinion of the District Court is at R. 202. The opinion of the Circuit Court of Appeals is at R. 213-217. None of the opinions are as yet reported, except the Circuit Court opinion, which is reported at 160 F. (2) 457.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347(a)) and Tit. 11, Sec. 47c U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 854.

Questions Presented

(1) On a turnover motion against an officer of a bankrupt, where the Referee in bankruptcy in granting the motion (affirmed by the District Court) *found as a fact, with most abundant support in the record, that respondent's story is unbelievable and a concoction,* has not petitioner established that respondent's claim to be an adverse claimant "is so unsubstantial and obviously insufficient, either in fact or in law, as to be plainly without color of merit,

and a mere pretense",* thus requiring the Circuit Court of Appeals to affirm the order of the District Court?

(2) May the Circuit Court of Appeals ignore Rule 52(a) F. R. C. P., and disregard the findings of fact of the Referee who has granted a turnover motion against an officer of a bankrupt (affirmed by the District Court), where the Referee, who has seen and observed respondent testify falsely throughout, and heard him give four contradictory versions of the material facts, has found as a fact, with most abundant support in the record, that respondent's claim to be an adverse claimant was unbelievable and a concoction?

(3) Is it the viewpoint of the Supreme Court (the question has never been before it) that a Referee in bankruptcy has no power to grant a turnover motion against an officer of a bankrupt, but must accept as true for the purpose of denying the motion, respondent's utterly unbelievable story, found by the Referee to be a concoction, because one of respondent's four contradictory versions, *if believed,* would make him an adverse claimant?

(4) The Circuit Court herein has held that a Referee in bankruptcy has no power to grant a turnover motion against an officer of a bankrupt, but must accept as true for the purpose of denying the motion, respondent's utterly unbelievable story, found by the Referee to be a concoction, because one of respondent's four contradictory versions, *if believed,* would make him an adverse claimant. The Circuit Courts of Appeals for the Third, Seventh and

---

* *Harrison* v. *Chamberlin,* 271 U. S. 191, 195.

Eighth Circuits, in granting such motions, have held to a much more liberal and realistic viewpoint.* **Is the Second Circuit correct or are the Third, Seventh and Eighth Circuits correct?**

Statutes and Rules Involved

Tit. 11, Sec. 11a(7) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 842 (Sec. 2a(7) of the Bankruptcy Act) gives Courts of Bankruptcy jurisdiction to cause the estates of bankrupts to be collected and to determine controversies in relation thereto except as otherwise provided in the Act.

Tit. 11, Sec. 11a(15) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 842 (Sec. 2a(15) of the Bankruptcy Act) provides that the said Courts may make such orders, issue such process, and enter such judgments, as may be necessary for the enforcement of the provisions of the Act.

Tit. 11, Sec. 66(6) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 857 (Sec. 38(6) of the Bankruptcy Act) invests Referees with jurisdiction to perform such of the duties as are conferred on Courts of Bankruptcy, except as otherwise provided in the Act.

Tit. 11, Sec. 75(a)(1) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 860 (Sec. 47a(1) of the Bank-

---

* *Rabinowitz* v. *Oughton* (C. C. A. 3rd) 92 F. (2) 297; cert. den. 303 U. S. 649; *Re Kansas City Journal-Post Co.* (C. C. A. 8th) 144 F. (2) 819; cert. dis. 323 U. S. 807; *Re Dayton Hotel Co.* (C. C. A. 7th) against former attorney for the debtor, 110 F. (2) 459; cert. den. 310 U. S. 641; *Re Gallis* (C. C. A. 7th) against bankrupt partner's father, 115 F. (2) 626; cert. den. 312 U. S. 704.

ruptcy Act) directs trustees to collect and reduce to money the property of the estates for which they are trustees, under the direction of the Court.

Rule 52(a) of the Federal Rules of Civil Procedure provides, *inter alia*, that findings of fact shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses.

Statement

The Receiver in bankruptcy (succeeded by the Trustee) moved before the Referee for an order directing Graham Magee, treasurer and a director of the bankrupt, to turn over the proceeds of a $5,000.00 check (R. 6, Trustee's Exs. 4A-4B, R. 163, 114) which had been paid to him as treasurer of the bankrupt, and which he admittedly diverted to his own personal bank account (R. 14). The check had been issued by William E. Leahy for corporate stock of the bankrupt (R. 165, 149, 156-157).

The Referee granted the motion (R. 180-193). The District Court affirmed the Referee's order (R. 202-203). The Circuit Court of Appeals reversed and denied the motion (R. 218), and denied the trustee's petition for rehearing (R. 224-225). The trustee now petitions this Court for a writ of certiorari.

The bankrupt was a New York corporation. Golenbock was president, Keelan was vice-president and secretary, Magee was treasurer. Magee, Golenbock and Keelan comprised the board of directors. Silverman, who was neither stockholder, officer nor director, was production manager (Trustee's Ex. 1, R. 162, 19). Casey, who figures in the

testimony, had no connection whatsoever with the bankrupt, being merely a friend of the various persons.

On August 8, 1945 Leahy sent Magee a letter (Trustee's Ex. 9, R. 165, 144) accompanied by a check for $5,000.00 payable to "Graham Magee, Treasurer" (Trustee's Exs. 4A-4B, R. 6, 163, 114) in payment for corporate stock of the bankrupt previously allotted to Leahy (R. 149, 156, 127-128). When Magee received the check he deposited it in his personal bank account (R. 14) to repay himself for an advance he had previously made to the bankrupt at the request of Casey in the sum of $5,128.42 (Respdt.'s Ex. 1, R. 166, 68).

The by-laws of the bankrupt provided that "the affairs and business of this Corporation shall be managed by a Board of Directors composed of 3 members" who "shall in all cases act as a Board regularly convened, by a majority • • •" (Trustee's Ex. 1, R. 162, 19). There is nothing in the minute book of the bankrupt authorizing the treasurer to deposit in his personal bank account monies received in payment for stock.

It is undisputed that the Board of Directors never authorized Magee to take for himself this $5,000.00 check intended for the bankrupt, and Magee's counsel admitted that no such resolution of the Board of Directors was ever adopted (R. 78). Nor is there any resolution of the Board of Directors granting Silverman *carte blanche* which the Circuit Court had found him to possess (R. 214-216).

It is petitioner's contention that the *incredible,* unsupported testimony of Magee conclusively established that he had pocketed the $5,000.00 without right or authority; and that his possession therefore *continued to be constructively the possession of the bankrupt.*

It may well be assumed that Magee, an attorney for over 20 years, with an income of $45,000.00 a year from other endeavors (R. 13-14), knew exactly what he was doing at all times.

Let us briefly analyze the highlights of his testimony.

The 'I Don't Know' Version

His First Version: Magee admitted that on January 4, 1946, prior to the institution of the turnover motion, he had testified in 21a proceedings that he had received the $5,000.00 check from Leahy in payment of Leahy's stock subscription, which check had been sent to him because he was treasurer; that Leahy had sent him no other check in that amount; and that he (Magee) had turned the check over to Jacobs, a minor officer, for deposit in the corporate account (R. 34-43); and that when he (Magee) had been asked as to whether he had been repaid his prior advance of $5,128.42, and by whom, that he had answered (R. 45):

> "Well, I imagine it would have been a check of Harlem Garment. I am only guessing. *They may never have paid me back, I don't know, to tell you the truth.*"

In this version we have a man who diverted to himself $5,000.00 in August, 1945, testifying less than five months thereafter that he did not know whether he had been repaid, when in fact he had pocketed the very check which he swore he had turned over to Jacobs. His purported uncertainty in this version concerning the repayment of his advance was obviously quite calculated and based upon a strong sense of guilt.

The Casey Version

His Second Version: Magee admitted that on March 6, 1946, the day he was served with the turnover motion, he asked for permission to correct his prior testimony, and testified before Referee Ehrhorn (presiding in the absence of Referee Kurtz) in 21a proceedings (R. 50-51). This version was to the effect that the $5,000.00 check from Leahy was not for stock in the corporation (R. 50-51, 29), but that the bankrupt needed money for payroll, and that he (Magee) had called up Casey (who was neither an officer, stockholder, director nor employee of the bankrupt) in Washington, and that *Casey* had told him "You go ahead and advance the money for payroll and I will get Mr. Leahy to send you a check for $5,000.00 to reimburse you" (R. 51, 29-30); and that thereupon he (Magee) advanced the money for payroll and was later reimbursed by Leahy with the $5,000.00 check (R. 50-51, 29-30, 58-60, 69).

The Circuit Court of Appeals agrees that Magee's denials that Leahy's check was for corporate stock, were "patent, even childish, concoctions, which the referee was right to disregard" (R. 214), and that in that connection "Magee showed himself utterly untrustworthy" (R. 217).

It is to be particularly noted that Referee Ehrhorn at the time specifically asked Magee *"Does that complete your correcting statement"? and Magee answered "Yes, sir"* (R. 51).

There is not a word in this correcting testimony about Silverman authorizing Magee to reimburse himself out of the Leahy money.

The One Line Version

HIS THIRD VERSION: In this version Magee embellished upon the second version, testifying (R. 72):

> "Q. When you talked to Mr. Casey did you speak to Mr. Silverman and tell him you talked to Mr. Casey? A. Yes, I did.
>
> Q. Did you tell him what Casey said? A. Yes, I did.
>
> Q. Did you have a talk with Mr. Silverman about that? A. Yes.
>
> Q. Did he say anything about that Leahy check? A. *He said, 'you can credit it against your loan.'* "

The last answer above is the only evidence in the entire record, 179 pages of testimony and exhibits, that Silverman (either on his own behalf or as agent of the bankrupt) authorized Magee to divert the $5,000.00 check into his own pocket.

The Circuit Court of Appeals has based its reversal upon this one line of *incredible* testimony (R. 214-217). It is incredible and not to be given any weight for any one of eight reasons:

(1) *It was not mentioned in his second* (nor in the first, R. 34-45) *version,* although the Referee had specifically asked "Does that complete your correcting statement?" (R. 51).

(2) If the second version (R. 50-51, 29-30, 58-60, 69) was the truth, why should Silverman as a representative of the bankrupt or in any other capacity be telling Magee what to do with the money? *Casey* had asked Magee to advance it. *Casey* had promised that it would be repaid. The money

coming from Leahy was to keep the promise made by *Casey*, and most certainly, according to that version, was not corporate funds, but was intended for Magee personally, and therefore no concern of the bankrupt or Silverman.

(3) Magee had sworn that he did not receive that check as an officer of the corporation, but in his individual capacity (R. 15). Why then should Silverman acting for the corporation have found it necessary to consent to the diversion of the money, if it was not corporate funds?

(4) If the conversation between Silverman and Magee had taken place, Silverman could only have been speaking on his own behalf and *not* on behalf of the corporation, *if the fourth version* [to be dealt with shortly] was the truth.

(5) Even if it be assumed that Silverman did make the statement and that he was presuming to speak on behalf of the bankrupt, the proof established that the Board of Directors never authorized Silverman to represent the bankrupt in that connection (Trustee's Ex. 1, R. 162, 19).

(6) Magee's entire testimony from beginning to end (R. 13-87, 130-133) had rendered him completely unworthy of belief.

(7) Magee did not produce Silverman to corroborate the statement and offered no reason for his failure to produce him, since the statement undoubtedly was never made by Silverman.

(8) Magee himself contradicted the statement, both prior thereto (first and second versions), and thereafter (fourth version).

The Circuit Court has held nevertheless that this unsupported one line assertion by Magee (obviously incredible and entitled to no weight whatsoever) deprived the Court of power to grant the motion!

The—Silverman Personal—Not Harlem—Version

His Fourth Version: Still later in his testimony Magee gave a fourth version (R. 76), testifying:

> "Q. He (Leahy) was not making you a gift of $5000, was he? A. He certainly was not to my knowledge. He was paying back the money I advanced for his account.
>
> Q. *At the request of Harlem Garment Co.?* A. *No;* at the request of Mr. Silverman and Mr. Casey.
>
> Q. Who was Mr. Leahy to look to to get back his $5000? A. I don't know.
>
> Mr. Tacker: I object to that, your Honor.
>
> The Referee: I think that is a fair question under the facts in this case where this witness has testified in relation to this transaction in two absolute diametrical fashions. Objections overruled.
>
> A. (continuing) The only thought I would have in the matter was that Leahy was a friend of Silverman and that *Silverman would expect to borrow money from Leahy.*"

In other words, in this version the obligation was definitely not that of the bankrupt, but of Silverman personally.

If this version was the truth, then Silverman's alleged statement that "you can credit it against your loan" (R. 72) upon which the Circuit Court saw fit to reverse, *could only have been made by him in his individual capacity and*

not as a representative of the bankrupt, since Silverman borrowed the money on his own behalf.

It is most respectfully submitted that upon the record herein there is no basis for determining (1) that Silverman ever made such statement, (2) that the statement, if made, was made by Silverman *as a representative of the bankrupt,* or (3) *that it is entitled to any weight.*

It follows therefore that the Circuit Court was in error in reversing the lower Courts upon the alleged statement of Silverman which, even if deemed to have been made, was entitled to no weight in fact or in law.

The Referee seeing and observing Magee make most unbelievable statements throught his entire testimony (R. 13-87, 130-133), both as above outlined and in a multitude of other respects with which we shall not now burden this Court, had no alternative but to declare as he did that respondent's story was a concoction (R. 188) and to grant the motion.

With due respect to the Circuit Court of Appeals we respectfully assert that it did not have the right in the circumstances, to reverse the Referee's order; and that in doing so it committed serious error, enunciating a theory of law which is not followed by other circuits (Re Kansas City Journal-Post Co, C. C. A. 8th, 144 Fed. 2nd 819; cert. dis. 323 U S. 807; Rabinovitz v. Oughton C. C. A. 3rd, 92 Fed. 2nd 297; cert. den. 303 U. S. 649; Re Dayton Hotel Co., C. C. A. 7th, 110 Fed. 2nd 459; cert. den. 310 U. S. 647; Re Gallis, C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704); nor in accord with the rulings of this Court (Harrison v. Chamberlain, 271 U. S. 191, 195; May v. Henderson, 268 U. S. 111, 116, 118-119.

In *Rabinovitz* v. *Oughton,* 92 F. (2d) 297; supra (C. C. A. 3rd), the trustee moved for an order directing that

Rabinovitz, an officer of the bankrupt, turn over certain monies unlawfully obtained by him from the bankrupt. The record (R. 14-21, transcript of record) discloses a defense which, *if believed,* would make respondent an adverse claimant. The Referee found the story unbelievable and granted the motion, holding that respondent's conduct "savored of a premeditated plot to dissipate and loot the bankrupt estate" and that he was "not always frank and responsive, but often contradictory." The District Judge stated "I find as a fact that there was a deliberate plot on their part to dissipate its assets for their own purposes" (p. 298, C. C. A. opinion). The Circuit Court held that "The referee and the District Court found that the appellant's claim was not adverse. *This finding is amply sustained by the evidence and is binding on us"* (p. 299, C. C. A. opinion, italics ours). This Court refused to grant a writ of certiorari (303 U. S. 649).

In *Re Kansas City Journal-Post Co.,* 144 F. (2d) 819, *supra* (C. C. A. 8th), the trustee moved for an order directing that Newman, an officer of the bankrupt, turn over $75,900 unlawfully obtained by him from the bankrupt. The facts in that case were quite similar to our facts, namely, the officer had diverted to his own purposes, without authority from the Board of Directors, monies which had come into his possession as such officer. The record (R. 35-41, transcript of record) discloses a defense which, *if believed,* would make respondent an adverse claimant. The Referee found his story to be without basis and granted the motion, holding that Newman was withholding the funds "without the slightest color of title" (p. 820, C. C. A. opinion). The District Court reversed "for want of jurisdiction in the referee to make the order in a summary pro-

ceeding" (p. 820, C. C. A. opinion). The Circuit Court reversed the District Court and reinstated the order of the Referee, holding that Newman's contention that he was an adverse claimant did not present " *'some fair doubt and reasonable room for controversy'* " (italics ours). Petition for certiorari was dismissed (323 U. S. 807).

Of particular note is the strongly worded statement of the Circuit Court therein (pp. 822-823, C. C. A. opinion) as to Newman's misconduct in diverting for his own purposes, without authority from the Board of Directors, funds which had come into his hands as officer of the bankrupt. That Court concluded (p. 823, C. C. A. opinion) with comment which is apropos herein—

> "Except for the fact that Newman was president of the corporation, he would not have been able to have gotten his hands upon the funds. Placing his hands upon them for the purpose which he did was a clear legal abuse of the functions of his office. He cannot assert that he had any colorable right against the corporation, by this abuse of his office, to take the law and the money into his own hands for the purpose of personally adjusting or protecting himself in any grievance he might have had against General Properties. The money legally belonged in the treasury of the corporation, still belongs there, and the trustee is entitled to have it restored."

In *re Dayton Hotel Co.*, 110 F. (2d) 459, supra (C. C. A. 7th), the trustee of the debtor moved for an order directing that Richter, former attorney for the debtor, turn over certain monies unlawfully retained by him. The record (R. 4-6, transcript of record) discloses a defense, which, *if believed,* would make respondent an adverse claimant. Richter, having lost below, insisted before the Circuit Court

that "it was the duty of the court, upon the filing of appellant's response, to determine whether appellant was wrongfully withholding money from the trustee without having any real interest in it, or whether there was a real controversy requiring a plenary suit; whether his claim was bona fide, or merely colorable" (p. 460, C. C. A. opinion). The Circuit Court declared that to be a fair statement of the Court's duties and held that the Court had complied with these requirements and that "appellant was wrongfully withholding the money in question; that his claim was not bona fide and that it did not tender a real controversy requiring a plenary suit" and that "on the merits the record is quite convincing that the court's findings were supported by *substantial evidence*" (p. 460, C. C. A. opinion, italics our). This Court refused to grant a writ of certiorari (310 U. S. 647).

In *Re Gallis,* 115 F. (2d) 626, *supra* (C. C. A. 7th), the trustee moved for an order directing that the father of one of the bankrupts turn over certain money unlawfully received by him from the bankrupts. Respondent contended (R. 7-8, transcript of record) that the money represented the lawful repayment of a debt, which would obviously make him an adverse claimant, *if believed.* The Referee granted the motion, giving no credence to the story. The District Court affirmed. The Circuit Court affirmed, holding (p. 627, C. C. A. opinion) **"The referee saw the witnesses and heard their stories at length. He was in a much better position than we, to pass on their credibility and the case is one which turns on credibility. His deliberate judgment is entitled to great weight. We must and do accept it. It is also clear that if his first finding (that respondent was not a creditor) is accepted, he was justified in concluding that appellant's adverse claimant status was not real and**

substantial, but merely colorable. The referee was therefore justified in acting in this summary proceeding. May v. Henderson, 268 U. S. 111; Harrison v. Chamberlin, 271 U. S. 191" (emphasis ours). This Court refused to grant a writ of certiorari (312 U. S. 704).

It is crystal clear that if the Third, Seventh and Eighth Circuits are correct in their decisions above, that the Second Circuit herein is in error on the law.

In the latest authoritative expression of the Supreme Court on the subject (Harrison v. *Chamberlin,* 271 U. S. 191, 195), *it was stated that a claim was to be held colorable if "the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense."*

That is just what the Referee found Magee's claim to be. The record abundantly supports the Referee's determination. The District Court affirmed. When the Circuit Court reversed, we state with due respect that it was not following the law laid down by this Court in Harrison v. *Chamberlin* (*supra*).

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that the Referee was in error in granting the turnover motion.

(2) In holding that the Referee was bound to determine that respondent was an adverse claimant because of a statement made by respondent which was in fact incredible and so found by the Referee (R. 188), and in any event entitled to no weight in fact or in law.

(3) In holding that petitioner had not established that respondent's contention "is so unsubstantial and obviously insufficient, either in fact or in law, as to be plainly without color of merit, and a mere pretense" (*Harrison* v. *Chamberlin,* 271 U. S. 191, 195).

(4) In failing to give "due regard • • • to the opportunity of the trial court to judge of the credibility of the witnesses" (Rule 52a F. R. C. P.), and in disregarding the Referee's finding, abundantly supported by the record, that "the story now told by the respondent was concocted by him" (R. 188).

(5) In holding that Silverman could be granted power to authorize respondent to divert the monies, by other than action of the Board of Directors duly convened.

(6) In holding without support in the record that Silverman had received power from the Board of Directors to authorize respondent to divert the monies.

(7) In holding that there was credible evidence that Silverman authorized respondent to divert the monies to his own use.

(8) In holding without credible evidence in support thereof that the statement "you can credit it against your loan" (R. 72) allegedly made by Silverman, was made as a representative of the bankrupt, when Magee's fourth version (R. 76) establishes that the statement could only have been made by Silverman *in his individual capacity and not as a representative of the bankrupt.*

(9) In holding (R. 214-216) without support in the record that the bankrupt owed Magee the $5,128.42 advanced

by Magee, when Magee's second, third and *fourth* (R. 76) versions establish that the advance was not made at the instance or request of the bankrupt.

(10) In holding that the bald, unsupported, one line statement of respondent that Silverman told him "you can credit it against your loan" was sufficient to deprive the Referee of power to grant the motion (R. 214-217), disregarding the fact that the statement was *unbelievable*, that respondent told three additional, contradictory versions, both before (first version, R. 34-35; second version, R. 50-51, 29-30, 58-60, 69) and after (fourth version, R. 76), and that his entire testimony was replete with falsehoods (R. 13-87, 130-133), requiring the Referee to determine that his story was a concoction (R. 188).

(11) In holding that respondent was to be dealt with as "a third person" (R. 215) rather than as an officer and director of the bankrupt.

(12) **In limiting in effect the power of a Referee to grant a turnover motion to such case only in which the respondent confesses his wrong and fails to repudiate the confession.**

(13) **In holding, with an overhanging threat of the denial of allowances (R. 217), that it is not a trustee's duty to, nor is he to, institute a turnover motion except "in the plainest cases" (R. 217).**

(14) In holding (where the record clearly establishes, and the Referee found, and was affirmed by the District Court, that respondent had not told the truth and that his story was a concoction) that the trustee had not "made out a plain enough case" (R. 213, 217).

(15) **In so limiting the power of a Referee to grant a turnover motion as to cripple seriously creditors in their pursuit of monies of a bankrupt estate unlawfully diverted by officers and directors of the bankrupt.**

(16) In misinterpreting and misapplying the applicable decisions of this Court (*Harrison* v. *Chamberlin,* 271 U. S. 191, 195; *May* v. *Henderson,* 268 U. S. 111, 116, 118-119) on the question as to the nature and character of the evidence required to be produced by an officer and director of a bankrupt **in order to be held to be an adverse claimant.**

(17) In rendering a decision in conflict with decisions of other Circuit Courts on the same matter, namely, the nature and character of the evidence necessary on a turnover motion against an officer and director of a bankrupt. (*Rabinovitz* v. *Oughton,* C. C. A. 3rd, 92 Fed. 2nd 297; cert. den. 303 U. S. 649; *Re Kansas City Journal-Post Co.,* C. C. A. 8th, 144 Fed. 2nd 819; cert. dismissed 323 U. S. 807; *Re Dayton Hotel Co.,* C. C. A. 7th, 110 Fed. 2nd 459; cert. den. 310 U. S. 647; *Re Gallis,* C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704.)

(18) **In rendering a decision in conflict with decisions of other Circuit Courts on the same matter, namely, the question of giving due regard to the opportunity of the Referee to judge of the credibility of the witnesses, and the disregarding of the Referee's findings, amply supported by the record, and the ignoring of Rule 52 (a) F. R. C. P.** (*Re Gallis,* C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704; *Rabinovitz* v. *Oughton,* C. C. A. 3rd, 92 Fed. 2nd 297; cert. den. 303 U. S. 649.)

Reasons for Granting the Writ

The Referee saw and heard respondent (treasurer and director of the bankrupt) testify. His entire testimony was incredible (R. 13-87, 130-133). He gave four contradictory stories on the material issue (pp. 7-12, *supra*). The Referee found as a fact with full support in the record that respondent's story was a concoction (R. 188) and granted the turnover motion (R. 190-193), which was affirmed by the District Court (R. 202-203).

The Circuit Court of Appeals for the Second Circuit (though holding that respondent's story in part was "patent, even childish, concoctions, which the Referee was right to disregard" R. 214, and that in that connection "Magee showed himself utterly untrustworthy" (R. 217) reversed and denied the motion, holding that respondent's *incredible* statement (found by the Referee to be a concoction, R. 188) that Silverman told him "you can credit it against your loan" (R. 72) made respondent an adverse claimant (in disregard of the fact that in no event was the statement entitled to any weight).

It is respectfully submitted that in so deciding—

(1) The Circuit Court for the Second Circuit has misinterpreted and misconstrued, and its decision is in conflict with, the applicable decisions of this Court (*Harrison* v. *Chamberlin*, 271 U. S. 191, 195; *May* v. *Henderson*, 268 U. S. 111, 116, 118-119).

(2) **The Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with decisions of other Circuit Courts on the same matter, namely, the nature and character of the evidence necessary on a turnover motion against an officer and director of a bankrupt** (*Rabinovitz* v. *Oughton*, C. C. A. 3rd, 92 Fed. 2nd 297; cert. den.

303 U. S. 649; *Re Kansas City Journal-Post Co.*, C. C. A. 8th, 144 Fed. 2nd 819; cert. dismissed 323 U. S. 807; against former attorney for the debtor, *Re Dayton Hotel Co.*, C. C. A. 7th, 110 Fed. 2nd 459; cert. den. 310 U. S. 647; against a bankrupt partner's father, *Re Gallis*, C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704).

(3) The Circuit Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(4) **The Circuit Court of Appeals for the Second Circuit has sharply and unreasonably reduced the nature and character of the evidence necessary to sustain the position of an alleged adverse claimant, which question has not been, but should be settled by this Court.**

(5) **The Circuit Court of Appeals for the Second Circuit has so limited the powers of a Referee, that a turnover motion against an officer and director of a bankrupt may be granted only, it would seem, in such instances where the officer has confessed his wrong doing, and has not repudiated the confession. This will seriously cripple creditor bodies in bankruptcies in their pursuit of funds belonging to the estate, and presents a question of sufficient public importance for this Court to decide authoritatively.**

The Circuit Court of Appeals for the Second Circuit has failed to give due regard to the opportunity of the Referee to judge of the credibility of respondent, and has disregarded the Referee's findings, abundantly supported by the record, ignoring Rule 52a F. R. C. P. In so doing—

(6) **The Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other Circuit Courts on the same matter** (*Re Gallis,*

C. C. A. 7th, 115 Fed. 2nd 626; cert. den. 312 U. S. 704; *Rabinovitz* v. *Oughton,* C. C. A. 3rd, 92 Fed. 2nd 297; cert. den. 303 U. S. 649).

(7) The Circuit Court of Appeals for the Second Circuit has decided a question which as it relates to turnover proceedings has not been, but should be, settled by this Court.

(8) Despite a record which abundantly supports the determination of the Referee in granting the motion (affirmed by the District Court), the Circuit Court of Appeals for the Second Circuit has held that this is not one of the "plainest cases"; and further, that a trustee in bankruptcy may not, under penalty of being deprived of allowances, institute a turnover motion "except in the plainest cases" (R. 217). The Circuit Court of Appeals for the Second Circuit in so ruling has decided a question which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

I. Jonas Speciner,
Attorney for Petitioner.

Julius M. Arnstein,
Of Counsel.

June 2nd, 1947.